

Amaefule-Emezie (Migration) [2021] AATA 3403 (27 August 2021)

- 1.
- 2.

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mrs Gloria Ifeoma Amaefule-Emezie Mr Samuel Nwaneri Amaefule
CASE NUMBER:	1833613
HOME AFFAIRS REFERENCE(S):	CLF2016/95612
MEMBER:	M. Edgoose
DATE:	27 August 2021
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicants Other Family (Residence) (Class BU) visas.

Statement made on 27 August 2021 at 10:35am

CATCHWORDS

MIGRATION – Other Family (Residence) (Class BU) visa – Subclass 835 (Remaining Relative) – remaining relative of an Australian relative – near relatives not usually resident in Australia – false and misleading information – severed family relationships – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, rr 1.03, 1.05, 1.12; Schedule 2, cl 836.321

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 29 October 2018 to refuse to grant the applicants Other Family (Residence) (Class BU) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The applicants applied for the visas on 12 December 2016. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 835.223 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the applicant has three confirmed near relative who are not usually resident in Australia and consequently, at time of making her application and therefore did not meet subregulation 1.15(1)(c) within the definition of Remaining Relative at reg 1.15.
5. The applicant did not appear before the Tribunal on the appropriate day at the appropriate time. The Tribunal notes that the applicant was contacted three times on her nominated telephone number and did not answer. The Tribunal notes that the applicant was invited to attend the hearing in the appropriate format. The Tribunal has considered this matter carefully and has decided to make a decision on the evidence before it.
6. For the following reasons, the Tribunal has concluded that the under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 835.223 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
8. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

9. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
10. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
11. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
12. According to the delegate's decision and the evidence before the Tribunal the applicant has given, or it was found that the evidence provided by the applicant, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth a 'bogus document', as defined in s 5(1).
13. The applicant did not declare three other siblings, Caroline Emezie, Dorothy Abii and Ndubuisi Emezie. In her Form 47OF, Form 54 and Form 80. The applicant's failure to declare all of her family members to the Department at time of application according to the Tribunal was false and misleading given that the applicant was applying for a Remaining Relative visa.
14. The applicant signed and dated the Form 47OF on 7 December 2016. In this application the applicant only declared two siblings, Ika Mezie and Chima Emezie. According to the delegate's decision the applicant was provided with a Form 54 (Family Composition) and a Form 80 (Personal particulars for assessment including character assessment) on 9 October 2017. On 24 September 2017 the applicant signed and dated the Form 54 and Form 80 and again only declared Ika Mezie and Chima Emezie as her siblings. The applicant did not declare Caroline Emezie, Dorothy Abii and Ndubuisi Emezie as her siblings at time of application and therefore provided a false and misleading statement on three occasions knowingly.
15. According to the delegate's decision on 28 May 2018 the Department invited the applicant to comment on the fact that she may have siblings that she had not declared in her visa application. On 24 June 2018 the applicant sent an email in response. The applicant stated in her response to the Department that
 16. She understood a near relative to be a relative with whom she has a harmonious relationship and who understands her feelings and problems.
 17. She did not include the names of Caroline Emezie, Dorothy Abii and Ndubuisi Emezie as relatives as she severed her relationship with them in 2007.

18. When she applied for the Subclass 835 visa she did not consider these people to be her relatives.

19. She still maintained that her sponsor, Ike Emezie, is her only near relative in Australia.

20. The Department was satisfied that the applicant has taken to corroborate that Caroline Emezie, Dorothy Abii and Ndubuisi Emezie are her siblings. The Tribunal is satisfied that the applicant has not declared all of her siblings to the Department at time of the visa application and has sign three separated forms, Form 47OF, Form 54 and Form 80, that required this information.

21. Therefore, the Tribunal is satisfied the applicant does not meet PIC 4020(1).

Postponement Request Refused

22. On 19 August 2021 the applicant submitted a postponement request to the Tribunal via email. The applicant stated in her email:

23. I am sick and not medically fit to attend the review on the 27th. Please, give me another date. see the doctor's sick certificate attached.

24. Attached to the postponement request was a letter dated 18 August 2021 from a Dr Asanka Lakmal Samarakoon which stated:

25. This is to certify that Mrs Gloria Amaefule has been suffering from aggravation of her chronic medical conditions lately and she will not be able to attend for review by the migration and refugee division of the AAT on the due date. Please allocate a new date in atleast 2 months time and she would be stable by then.

26. The Tribunal refused to the postponed request on 20 August 2021 due to the limited information contained in the medical certificate. The applicant was informed the hearing would proceed by phone as scheduled.

27. On 23 August 2021 the applicant submitted a further postponement request via email to the Tribunal. The applicant stated in her email:

28. Thanks for your email that seems to suggest that the doctor gave limited information while asking for a postponement of the review date. This morning, I managed to see the doctor who wrote more elaborate information concerning my current health and has attached the hospital discharged summary, along with my subsequent follow --up visit to see the specialist. Please see the attached medical documents from the doctors. I hope this can help you understand my current state of health.

29. The Tribunal notes that the attachments to this email consisted of a further letter from the applicant's doctor Dr Asanka Lakmal Samarakoon dated 23 August 2021 and a hospital discharge summary where the applicant was admitted to Sunshine Hospital (Western Health) on 5 March 2021 and discharged on 12 March 2021 and a respiratory function report dated 10 June 2021. Dr Asanka Lakmal Samarakoon letter stated:

30. This is to certify that Mrs Gloria Amaefule has been diagnosed of having chronic Thrombo embolic pulmonary hypertension with right hear failure requiring home based long term oxygen therapy. She is followed up at western hospital and records are attached for your reference. She is currently very short of breath and finds it difficult to complete a sentence without a break due to aggravation of her medical condition. I would be grateful if you could post pone her hearing on 27 th of August 2021 and give her a later hearing.

31. The Tribunal refused the applicant's postponement request on 26 August 2021 given that the evidence provided referred to the applicant being admitted to Sunshine Hospital on 5 March 2021 and discharged on 12 March 2021 and approximately 3 months later undertaking a respiratory function test on 10 June 2021. Given that the applicant's doctor, Dr Asanka Lakmal Samarakoon, has only referred to the above documents in his letter and stated that he "*would be grateful*" if the Tribunal granted the applicant a postponement. The doctor made no mention in his letter that the applicant would not be able to take place in a phone hearing from her residence. For these reasons the Tribunal refused the applicant's postponement request. The applicant was informed the hearing would proceed by phone as scheduled.
32. On 26 August 2021 at 2:17pm the applicant submitted via email a response to the hearing invitation. The applicant did not complete the section on "*who will take part in the hearing*". The applicant completed the section on "*participating in the hearing*" and answered "yes".
33. I am not fit to attend the hearing because I have been placed on oxygen because I have been serious respiratory failures.
34. Because I am not able to talk for more than two minutes without having respiratory failure.
35. The Tribunal has considered the information mentioned in the applicant's response to the hearing invitation and gives it no weight given that no evidence was provided that the applicant is on oxygen.
36. The applicant submitted a further postponement request via email on 26 August 2021 at 3:45pm. The applicant stated in her email:
37. Yes I developed Pulmonary Embolism with complications that led to respiratory and heart failures
I am currently on oxygen and other medications and not medically fit to make full sentences as stated by my Gp in his letter to you. I saw the specialist respiratory physician Dr Anne Marie Southcott on the 9th of August who reviewed and maintained this current treatment regime. Please please, I am not medically fit for the review interview. I can do that at a later date. Thanks
38. On the date of the hearing the Tribunal attempted to call the applicant three times on her nominated telephone number, and she did not answer. The applicant was informed by the Tribunal on 26 August 2021 that her postponement request had been refused. Contained within this letter from the Tribunal was the following information:
39. If we do not advise you that an adjournment has been granted, you must assume that the hearing will go ahead.
40. And that:
41. If you do not participate in the scheduled hearing (that is, you do not answer your phone at the scheduled date and time), we may make a decision on the review without taking any further action to allow or enable you to appear before us or may dismiss your application for review without any further consideration of the application or the information before us.
42. Given that the applicant did not answer the phone on the scheduled date and time the Tribunal has proceeded to make a decision based on the information before it.

Should the requirements of PIC 4020(1) or (2) be waived?

43. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
44. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
45. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
46. Given that the applicant did not answer the phone on the scheduled date and time the Tribunal has proceeded to make a decision base on the information before it.
47. The applicant has not provided any evidence to the Tribunal in relation to whether the requirements of PIC 4020(1) should be waived. For these reasons the Tribunal considers there are not compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that justify the granting of the visa.
48. Therefore, the requirements of PIC 4020(1) should not be waived.
49. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 835.223.

DECISION

50. The Tribunal affirms the decision not to grant the applicants Other Family (Residence) (Class BU) visas.

M. Edgoose
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...